No. 78-1788

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY POLLAK, INC., ET AL., PETITIONERS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that the district court erred in ruling that it lacked jurisdiction to consider their challenge to a 10% import duty surcharge imposed by the President in 1971.

1. In August 1971, in response to the growing United States balance of payments deficit, President Nixon imposed a supplemental duty on imported goods (Pet. App. 4a-5a). The Presidential proclamation that effected this action (Pet. App. 27a-31a) was terminated by another such proclamation issued four months later (Pet. App. 32a-34a), after the United States and other major industrial nations had reached a multilateral agreement designed to alleviate the balance of payments problem.

Petitioners are importers who paid the supplemental import duty during the four-month period it was in effect. At least some petitioners filed protests with the United States Customs Service, in accordance with 19 U.S.C. 1514 (Pet. App. 5a). Other importers also filed such protests. They all argued that the President lacked the statutory and constitutional authority to impose an import duty surcharge.

One of the protesting importers, not a petitioner in the present case, was Yoshida International, Inc. When the Customs Service denied Yoshida's protest, the company filed suit in the United States Customs Court, invoking the court's jurisdiction under 28 U.S.C. 1582 and challenging the President's authority to impose the surcharge by proclamation. The Customs Court held that the President's action exceeded the authority delegated to him by Congress and that the import charge was therefore invalid. 378 F. Supp. 1155 (1974).

While the government's appeal was pending in the Court of Customs and Patent Appeals, Congress passed the Trade Act of 1974, 88 Stat. 1978. Two provisions of the Act are relevant to the present dispute. Section 122(a) empowered the President to impose temporary import duty surcharges in response to "large and serious United States balance-of-payments deficits" and thus removed all doubt about the statutory authority for future Presidential proclamations like that issued in August 1971. See 88 Stat. 1987-1988 (now codified at 19 U.S.C. 2132(a)).[1] Section 611 of the Act, 88 Stat. 2075-2076, taking account

[1]At the same time, Section 122(h) of the 1974 Act, 88 Stat. 1989, made clear that in the future the President could not rely on statutes authorizing the termination of tariff concessions, such as the Tariff Act of 1930 and the Trade Expansion Act of 1962, as the legal basis for the imposition of an import duty surcharge.

of the *Yoshida* litigation and the numerous pending administrative protests concerning the 10% surcharge, extended the time for administrative review of such protests to five years after their filing.[2] The Senate report explained that Section 611 "would permit the resolution of [the *Yoshida*] appeal and any subsequent appeals without denying the thousands of protests already made." S. Rep. No. 93-1298, 93d Cong. 2d Sess. 235 (1974). Accordingly, the Customs Service deferred further action on importers' protests pending final resolution of the *Yoshida* litigation.

In November 1975, the Court of Customs and Patent Appeals reversed the decision of the Customs Court and held that "the President's action under review was within the power constitutionally delegated to him" in Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b). *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560, 584. Like the Customs Court, the Court of Customs and Patent Appeals rejected the government's argument that Congress had provided adequate statutory authority for the 10% import surcharge in Section 350(a)(6) of the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and Section 255(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1885(b).[3] The appellate court ruled, however, that Section 5(b) of the Trading With the Enemy Act authorized the President, during any national emergency

[2]Ordinarily, 19 U.S.C. 1515 requires that the Customs Service decide whether to allow or deny a protest within two years of the filing date.

[3]The General Counsel of the Treasury Department had relied exclusively on the Tariff Act and the Trade Expansion Act in his September 1971 opinion finding sufficient legal basis for the imposition of a surcharge by Presidential proclamation. See Pet. App. 35a-40a.

declared by the President, to regulate importation by imposing an import duty surcharge.[4] The court further held that the exercise of the authority in the August 1971 proclamation was within the scope of a constitutionally permissible delegation of legislative power, because it was closely tied to existing tariff schedules established by Congress and was reasonably related to the power delegated and the emergency confronted. The court reaffirmed this result the following year in a suit brought by another importer, *Alcan Sales* v. *United States*, 534 F. 2d 920. This Court denied certiorari, 429 U.S. 986 (1976).

Subsequently, petitioners filed the present action in the United States District Court for the District of Columbia. Like the plaintiffs in *Yoshida* and *Alcan Sales*, they challenged the President's authority to impose the 10% import surcharge. Petitioners invoked the district court's jurisdiction under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. 9(a). They asserted that Section 9(a) manifested a congressional intention that suits under the Act should be litigated in the federal district courts. They argued further that, because the Court of Customs and Patent Appeals had identified Section 5(b) of the Acts as the source of the President's authority to impose the import surcharge, challenges to the surcharge could properly be brought in the district court.

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[4]In 1977 Congress amended Section 5(b) to provide that the President may exercise his powers under the Section only in times of war declared by Congress. 91 Stat. 1625. At the same time, Congress passed the International Emergency Economic Powers Act, 91 Stat. 1627-1629 (to be codified at 50 U.S.C. 1701-1706), granting the President substantial authority to regulate certain international economic transactions in times of national emergency declared by the President in response to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States * * *."

The district court disagreed and dismissed the suit for lack of jurisdiction (Pet. App. 3a-13a). The court held that 28 U.S.C. 1582 confers on the Customs Court exclusive jurisdiction over actions concerning the "rate and amount of duties chargeable." The court concluded that the character of petitioners' lawsuit was not affected by the source of the President's statutory authority to impose the import surcharge. The critical factor, in the court's view, was the subject matter of the complaint: a challenge to a system of supplemental charges superimposed on the detailed tariff schedules already enacted by Congress and applicable, therefore, only to articles already subject to import duty as the result of earlier legislative action. The court stated (Pet. App. 11a; citation omitted):

> [G]iven the unquestionable allocation to the Customs Court of challenges to the Tariff Schedules, including issues of their underlying constitutionality, it would be nonsensical to conclude that challenges to a program of surcharges built upon the Schedules should be matters within the jurisdiction of a different court * * *.

The court of appeals affirmed without opinion (Pet. App. 1a-2a). The court stated in its judgment that it agreed with the result reached by the district court, "generally for the reasons given in [that court's] memorandum opinion."

2. The district court correctly held that it lacked jurisdiction to consider petitioners' claim for refund of the additional duties paid under the 1971 import surcharge. Section 1582 of the Judicial Code, 28 U.S.C. 1582, commits such duty refund suits to the exclusive jurisdiction of the Customs Court. The scope of the exclusive jurisdiction conferred by Section 1582 becomes clear

when that provision is read in conjunction with 19 U.S.C. 1514. The latter statute provides that, with certain limited exceptions not relevant here, the decisions of the appropriate customs officer, including the legality of all orders, concerning "the classification and rate and amount of duties chargeable * * * shall be final and conclusive * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest * * * is commenced in the United States Customs Court in accordance with section 2632 of title 28 * * *." Section 1582, in turn, provides the jurisdictional base for the civil actions described in 28 U.S.C. 2632, *i.e.*, actions contesting a Customs Service denial of a protest filed in accordance with the governing law. Thus, a customs officer's decision regarding the amount of duty owed on imported goods is final unless a protest is filed under 19 U.S.C. 1514, and the Service's rulings on such protests can be reviewed only in civil actions lying within the exclusive jurisdiction of the Customs Court.

The foregoing discussion is not affected by the statutory authority under which a particular import duty is imposed. Whether the 1971 surcharge was authorized by the Tariff Act of 1930 or the Trade Expansion Act of 1962 or the Trading With the Enemy Act, the administrative and judicial mechanism for review of complaints concerning the amount of duty charged remains the same. The statute requiring the filing of a protest with the Customs Service, 19 U.S.C. 1514, does not distinguish in any way between import duties imposed under one grant of legislative authority rather than another.

Moreover, the jurisdictional provision on which petitioners rely, Section 9(a) of the Trading With the

Enemy Act, does not in terms confer any jurisdiction on the federal district courts to hear suits concerning import duties paid to customs officers. Nor is Section 9(a) a general jurisdictional statute, authorizing district courts to entertain all disputes arising under the Trading With the Enemy Act. Rather, Section 9(a) refers only to suits involving "money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * *." Petitioners in the present case have not paid any money to the Alien Property Custodian (see 50 U.S.C. App. 6), nor has the Custodian seized any of petitioners' property. The jurisdictional grant in Section 9(a) therefore has no application here.

But even if the district court were the proper forum for petitioners' complaint, their challenge to the validity of the 1971 surcharge would be unavailing. For the reasons stated in the government's brief in opposition in *Alcan Sales*, *supra* (No. 76-312),[5] the Court of Customs and Patent Appeals correctly decided that the President acted within the scope of his statutory authority when he imposed the 10% import surcharge. Moreover, the underlying substantive question at issue in this case is of little or no continuing importance, since Congress, in the Trade Act of 1974, unmistakably granted the President authority to impose temporary import surcharges for balance-of-payments purposes. See 19 U.S.C. 2132(a). Under these circumstances, further review of the district court's construction of Section 9(a) of the Trading With the Enemy Act and its interaction with the Customs Court's exclusive jurisdiction under 28 U.S.C. 1582 is not warranted.

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[5]A copy of the brief in opposition in *Alcan Sales* has been sent to petitioners.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979

DOJ-1979-07